

Motion to dismiss
Bankruptcy Court jurisdiction
Assumption of lease

Smith v FMCC, Adversary No. 10-6091
Michael and Jamie Smith, Case No. 09-64658

9/13/2010 FRA

Unpublished

At the time Plaintiffs filed bankruptcy under chapter 7, they were in possession of a Ford Fusion leased from the Defendant. Neither the vehicle nor the lease were referred to in the Plaintiffs' Statement of Intention(s) filed with their bankruptcy petition. According to the parties, Defendant invited Plaintiffs to fill out and return a reaffirmation agreement. Plaintiffs did so, but the agreement was never signed by Defendant or returned to the Court. The Trustee specifically declined to assume the vehicle lease. After the Plaintiffs were granted a discharge and their bankruptcy case was closed, Defendant repossessed the vehicle. Up to that time, Plaintiffs had never missed or been late on a lease payment.

Plaintiffs reopened their bankruptcy case and filed an adversary proceeding seeking contempt damages for violation of the discharge injunction as well as damages under state law for breach of the lease agreement. Defendant filed a motion to dismiss.

The Court analyzed the various Code provisions dealing with a lease assumption of personal property in chapter 7, and summarized it as follows:

1) Debtor must within 45 days of the petition date file a statement of the debtor's intention to assume a lease.

2) Assuming the trustee does not assume the lease within 60 days of the petition date (failure by the trustee to assume constitutes a breach of the lease agreement), the debtor must then notify the creditor in writing of the debtor's desire to assume the lease.

3) Whatever the debtor's intentions, if the trustee does not assume the lease, the leased property ceases to be property of the estate and continuation of the lease by the debtor is at the option of the lessor, who may choose to pursue its state law remedies for breach of its lease agreement.

The Court held that the Plaintiffs failed to put the lessor on notice of their intention to assume the lease within 45 days of the petition date. Even if the tendered reaffirmation agreement constituted written notice after the trustee failed to

assume the lease, continuation of the lease was purely at the option of the Defendant, as the Trustee did not assume the lease for the estate. Neither the lease nor the vehicle were subject to the automatic stay or the discharge injunction.

Because the bankruptcy claim for contempt was dismissed, the court lacked jurisdiction to continue with the state-law claims and dismissed the entire action.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 09-64658-fra7
MICHAEL DONOVAN SMITH and)	
JAMIE LYNN SMITH,)	
)	
_____ Debtors.)	
MICHAEL DONOVAN SMITH and)	Adversary Proceeding
JAMIE LYNN SMITH,)	No. 10-6091-fra
)	
Plaintiffs,)	
vs.)	
)	
FORD MOTOR CREDIT COMPANY, LLC, and)	
CAB WEST, LLC,)	
)	MEMORANDUM OPINION
_____ Defendants.)	

Plaintiffs commenced an action against Defendants for damages arising out of the Defendants' post-discharge repossession of a leased motor vehicle. Contempt damages are sought on the grounds that the repossession violated the discharge injunction. In addition, Plaintiffs seek damages under state law for breach of the lease agreement.

Defendants filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). The Court finds that the prosecution under the Bankruptcy Code cannot be sustained. It follows that the Court lacks jurisdiction to

1 consider any state law claims arising out of the circumstances, and
2 Defendants' motion should be allowed.

3 I. MOTION TO DISMISS

4 Review of a complaint under Fed.R.Civ.P. 12(b)(6)¹ is based on
5 the contents of the complaint, the allegations of which are accepted as
6 true and construed in the light most favorable to the plaintiff. North
7 Slope Borough v. Rogstad (*In Re Rogstad*), 126 F.3d 1224, 1228 (9th Cir.
8 1997) (citations omitted). "[O]nce a claim has been adequately stated, it
9 may be supported by showing any set of facts consistent with the
10 allegations in the complaint." Bell Atlantic Corp. v. Twombly, 127
11 S.Ct.1955, 1969 (2007) (internal citation omitted).² This standard
12 requires "enough fact to raise a reasonable expectation that discovery
13 will reveal evidence [supporting the cause of action]." Id. at 1965.
14 However, the court need not accept as true unreasonable inferences or
15 conclusory legal allegations cast in the form of factual allegations.
16 Naert v. Daff, (*In Re Washington Trust Deed Service Corp.*), 224 B.R. 109,
17 112 (9th Cir. BAP 1998).

18 In considering the motion, the court may not consider any
19 material "beyond the pleadings." Hal Roach Studios. Inc. v. Richard
20 Feiner and Co. Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However,
21 material which is properly submitted as part of the complaint may be

22 _____
23 ¹Fed.R.Civ.P. 12(b)(6) is made applicable by Fed.R.Bankr.P. 7012(b).

24 ²The Bell Atlantic Corp. opinion supercedes that part of Conley v.
25 Gibson, 355 U.S. 41, 45-46 (1957), wherein the Supreme Court stated that
26 dismissal for failure to state a claim is improper unless it appears
beyond a doubt that the plaintiff can prove no set of facts to support
his claim or entitle him to relief.

1 considered. Id. Exhibits submitted with the complaint may also be
2 considered. Durning v. The First Boston Corp., 815 F.2d 1265, 1267 (9th
3 Cir. 1987). Further, a document whose contents are alleged in the
4 complaint, or which is crucial to the complaint, and whose authenticity
5 no party questions, but which is not physically attached to the pleading,
6 may be considered. Branch v. Tunnell, 14 F.3d 449, 453-454 (9th Cir.
7 1994), cert. den. 119 S. Ct. 510(1998) (contents alleged in, but not
8 attached to, complaint); Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th
9 Cir. 1998) (not specifically alleged and unattached, but integral to
10 plaintiffs claims). Finally, matters that may be judicially noticed may
11 be considered, Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279,
12 1282 (9th Cir. 1986), abrogated on other grounds, Astoria Federal Savings
13 and Loan Ass'n v. Solimino, 501 U.S. 104 (1991), including court records
14 in related or underlying cases. In re American Continental Corp./ Lincoln
15 Sav. & Loan Securities Litigation, 102 F.3d 1524, 1537 (9th Cir. 1996),
16 rev'd on other grounds sub nom., Lexecon Inc. v. Milberg Weiss Bershad
17 Hynes and Lerach, 523 U.S. 26 (1998).

18 II. FACTS

19 Plaintiffs filed for relief under Chapter 7 of the Bankruptcy
20 Code on October 28, 2009. At that time, they were in possession of a
21 2008 Ford Fusion leased from the Defendants. The vehicle is described in
22 Schedule B (said there to have no value), and as the subject of an
23 executory lease described in Schedule G. Schedule G notes that the
24 Debtors' interest is a "lease on 2008 Ford Fusion \$14,000." Neither the
25 vehicle nor the lease are referred to in the Debtors' "Chapter 7
26 // // //

1 Individual Debtors' Statement of Intention(s)" filed with their petition
2 pursuant to Code § 521(a)(6).³

3 Although the Debtors' Statement of Intentions does not refer to
4 the lease with Defendants, Defendants - according to colloquy between the
5 Court and parties at oral argument - invited Plaintiffs to fill out and
6 return a reaffirmation agreement. Plaintiffs did so, but, for reasons
7 unknown (at least to the Court), the Defendants declined to enter into a
8 reaffirmation agreement, and the agreement was never signed, much less
9 filed with the Court.

10 An order granting Plaintiffs their Chapter 7 discharge was
11 entered on January 27, 2010 and the case was closed on that date.
12 Defendants repossessed the leased vehicle on March 3, 2010. Up to that
13 point, the Plaintiffs had never missed or been late on any of the lease
14 payments owed to the Defendants.

15 III. PROCEDURAL HISTORY

16 Plaintiffs' complaint was filed on March 16, 2010. The first
17 two claims of the complaint allege violation of the discharge injunction,
18 and that Defendants' willful violation of the injunction was an act of

19
20 ³ At oral argument, Plaintiffs' counsel stated that the Debtors
21 attempted to include in their statement of intentions their desire to
22 assume or reaffirm the lease. However, due to a software error, the
23 information did not find its way into the final version transmitted to
24 and filed with the Court. These unfulfilled good intentions are of no
25 avail: parties are responsible for ensuring that the schedules and other
26 materials filed with the Court are complete. The Debtors' duties under
the Code are not excused by technical breakdowns on their or their
attorney's part. Moreover, interested parties are entitled to rely on the
information provided in the course of a bankruptcy case. See In re
Cossio, 163 B.R. 150, 156 (9th Cir. BAP 1994) (internal citation omitted).

1 contempt. The third and fourth claims allege, respectively, violation of
2 the Uniform Commercial Code as enacted in Oregon, and violation of the
3 lease. The Court dismissed the state law claims, and Plaintiffs filed an
4 amended complaint limited to claims under the Bankruptcy Code.

5 Defendants have now moved to dismiss the federal claims. FRCP
6 12(b)(6). Plaintiffs have moved for reconsideration of the Court's
7 earlier determination that the state law claims should not be tried in
8 federal court.

9 IV. DISCUSSION

10 A debtor who wishes to retain leased personal property must
11 sort out and comply with a confusing welter of statutory provisions.
12 Even then, as we'll be seeing, continuation of the lease, and debtor's
13 continued possession of the property, lies solely within the lessor's
14 discretion.

15 Pertinent statutory provisions appear to run on two separate,
16 and somewhat contradictory veins. One set of statutes is concerned with
17 the process of assumption of the unexpired lease, while the other
18 addresses mandatory notice by the debtor to the lessor.

19 A. Lease Assumption:

20 The debtor's interest in an unexpired lease becomes, when the
21 petition is filed, property of the estate, subject to the control of the
22 trustee. Code § 541. Section 365(d) provides:

23 (1) In a case under chapter 7 of this title, if the
24 trustee does not assume or reject an executory
25 contract or an unexpired lease of residential real
26 property or of personal property of the debtor within
60 days after the order for relief, or within such
additional time as the court for cause, within such 60
day period day, fixes, then such contract or lease is

1 deemed rejected.

2 Rejection of an unexpired lease by the chapter 7 trustee
3 constitutes a breach of the lease, the leased property ceases to be
4 property of the estate, the automatic stay is terminated, and the lessor
5 is entitled to its state law remedies for such breach. Code §§ 365(g),
6 365(p) (1).⁴ See also Blackburn v. Security Pacific Credit Corp. (In re
7 Blackburn), 88 B.R. 273, 276 (Bankr. S.D. Cal. 1988). However, § 365(p)
8 provides the debtor with an opportunity to assume the lease rejected by
9 the trustee, *if* the lessor consents:

10 (2) (A) If the debtor in a case under chapter 7 is an
11 individual, the debtor may notify the creditor in
12 writing that the debtor desires to assume the lease.
13 Upon being so notified, the creditor may, *at its*
14 *option* [italics added], notify the debtor that it is
15 willing to have the lease assumed by the debtor and
16 may condition such assumption on cure of any
17 outstanding default on terms set by the contract.

18 (B) If, not later than 30 days after notice is
19 provided under subparagraph (A), the debtor notifies
20 the lessor in writing that the lease is assumed, the
21 liability under the lease will be assumed by the
22 debtor and not by the estate.

23 * * *

24 B. Notice Provisions:

25 Code § 521(a) (6) provides that an individual debtor under
26 Chapter 7 may

not retain possession of personal property as to which
a creditor has an allowed claim for the purchase price

⁴Section 365(p) (1): "If a lease of personal property is rejected or not timely assumed by the trustee under section (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated."

1 secured in whole or in part by an interest in such
2 personal property unless the debtor, not later than 45
3 days after the first meeting of creditors under
§ 341(a) either -

4 (a) enters into an agreement with the creditor
pursuant to § 524(c) with respect to the claim secured
by such property; or

5 (b) redeems such property from the security
6 interest pursuant to § 722....

7 This provision is brought to bear with respect to personal
8 property leases by § 521(d):

9 (d) If the debtor fails timely to take the action
10 specified in subsection (a)(6) of this section, or in
11 paragraphs 1 and 2 of § 362(h) [requiring performance
of duties under § 521(a)(2)] with respect to property
12 which a lessor or bailor owns and has leased...nothing
13 in this title shall prevent or limit the operation of
a provision in the underlying lease or agreement that
14 has the effect of placing the debtor in default under
such lease or agreement by reason of the occurrence,
15 pendency, or existence of a proceeding under this
title or the insolvency of the debtor. Nothing in
this subsection shall be deemed to justify limiting
such a provision in any other circumstance.

16 Read together, these Code provisions require the following
17 actions of a debtor wishing to assume an unexpired lease of personal
18 property:

19 1. The debtor must, within 45 days of the petition for relief,
20 file a statement of the debtor's intention to assume the lease; and

21 2. Assuming the trustee does not assume the lease within 60
22 days of the order for relief, the debtor must then notify the creditor in
23 writing of the debtor's desire to assume the lease.

24 Whatever the debtor's intentions, the leased property is no
25 longer property of the estate unless the trustee elects to assume the
26 lease. Absent assumption by the trustee, continuation of the lease by

1 This Memorandum Opinion constitutes the Court's findings of
2 fact and conclusions of law. A separate order will be entered dismissing
3 the adversary proceeding.



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7 FRANK R. ALLEY, III

8 Bankruptcy Judge
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